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to Joint Opposition

Antitrust Guidelines for Collaborations Among Competitors

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ANTITRUST GUIDELINES FOR
COLLABORATIONS AMONG COMPETITORS

TABLE OF CONTENTS

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PREAMBLE

In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

Such collaborations often are not only benign but procompetitive. Indeed, in the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations. Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.[1]

To provide guidance to business people, the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") previously issued guidelines addressing several special circumstances in which antitrust issues related to competitor collaborations may arise.[2] But none of these Guidelines represents a general statement of the Agencies' analytical approach to competitor collaborations. The increasing varieties and use of competitor collaborations have yielded requests for improved clarity regarding their treatment under the antitrust laws.

The new *Antitrust Guidelines for Collaborations among Competitors* ("*Competitor Collaboration Guidelines*") are intended to explain how the Agencies analyze certain antitrust issues raised by collaborations among competitors. Competitor collaborations and the market circumstances in which they operate vary widely. No set of guidelines can provide specific

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[1] Congress has protected certain collaborations from full antitrust liability by passing the National Cooperative Research Act of 1984 ("NCRA") and the National Cooperative Research and Production Act of 1993 ("NCRPA") (codified together at 15 U.S.C. § § 4301-06).

[2] The *Statements of Antitrust Enforcement Policy in Health Care* ("*Health Care Statements*") outline the Agencies' approach to certain health care collaborations, among other things. The *Antitrust Guidelines for the Licensing of Intellectual Property* ("*Intellectual Property Guidelines*") outline the Agencies' enforcement policy with respect to intellectual property licensing agreements among competitors, among other things. The *1992* DOJ/FTC *Horizontal Merger Guidelines*, as amended in 1997 ("*Horizontal Merger Guidelines*"), outline the Agencies' approach to horizontal mergers and acquisitions, and certain competitor collaborations.

answers to every antitrust question that might arise from a competitor collaboration. These Guidelines describe an analytical framework to assist businesses in assessing the likelihood of an antitrust challenge to a collaboration with one or more competitors. They should enable businesses to evaluate proposed transactions with greater understanding of possible antitrust implications, thus encouraging procompetitive collaborations, deterring collaborations likely to harm competition and consumers, and facilitating the Agencies' investigations of collaborations.

SECTION 1: PURPOSE, DEFINITIONS, AND OVERVIEW

1.1 Purpose and Definitions

These Guidelines state the antitrust enforcement policy of the Agencies with respect to competitor collaborations. By stating their general policy, the Agencies hope to assist businesses in assessing whether the Agencies will challenge a competitor collaboration or any of the agreements of which it is comprised.[3] However, these Guidelines cannot remove judgment and discretion in antitrust law enforcement. The Agencies evaluate each case in light of its own facts and apply the analytical framework set forth in these Guidelines reasonably and flexibly.[4]

A "competitor collaboration" comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom.[5] "Competitors" encompasses both actual and potential competitors.[6] Competitor collaborations involve one or more business activities, such as research and development ("R&D"), production, marketing, distribution, sales or purchasing. Information sharing and various trade association activities also may take place through competitor

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[3] These Guidelines neither describe how the Agencies litigate cases nor assign burdens of proof or production.

[4] The analytical framework set forth in these Guidelines is consistent with the analytical frameworks in the *Health Care Statements* and the *Intellectual Property Guidelines*, which remain in effect to address issues in their special contexts.

[5] These Guidelines take into account neither the possible effects of competitor collaborations in foreclosing or limiting competition by rivals not participating in a collaboration nor the possible anticompetitive effects of standard setting in the context of competitor collaborations. Nevertheless, these effects may be of concern to the Agencies and may prompt enforcement actions.

[6] Firms also may be in a buyer-seller or other relationship, but that does not eliminate the need to examine the competitor relationship, if present. A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter.

collaborations.

These Guidelines use the terms "anticompetitive harm," "procompetitive benefit," and "overall competitive effect" in analyzing the competitive effects of agreements among competitors. All of these terms include actual and likely competitive effects. The Guidelines use the term "anticompetitive harm" to refer to an agreement's adverse competitive consequences, without taking account of offsetting procompetitive benefits. Conversely, the term "procompetitive benefit" refers to an agreement's favorable competitive consequences, without taking account of its anticompetitive harm. The terms "overall competitive effect" or "competitive effect" are used in discussing the combination of an agreement's anticompetitive harm and procompetitive benefit.

1.2 Overview of Analytical Framework

Two types of analysis are used by the Supreme Court to determine the lawfulness of an agreement among competitors: per se and rule of reason.[7] Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful.[8] All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.[9]

This overview briefly sets forth questions and factors that the Agencies assess in analyzing an agreement among competitors. The rest of the Guidelines should be consulted for the detailed definitions and discussion that underlie this analysis.

Agreements Challenged as Per Se Illegal. Agreements of a type that always or almost always tends to raise price or to reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

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[7] *See* National Soc'y of Prof'l. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[8] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-36 (1990).

[9] *See* California Dental Ass'n v. FTC, 119 S. Ct. 1604, 1617-18 (1999); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459-61 (1986); National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104-13 (1984).

Agreements Analyzed under the Rule of Reason. Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

The Agencies' analysis begins with an examination of the nature of the relevant agreement. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm. In some cases, the nature of the agreement and the absence of market power together may demonstrate the absence of anticompetitive harm. In such cases, the Agencies do not challenge the agreement. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power or facilitate its exercise. The Agencies examine the extent to which the participants and the collaboration have the ability and incentive to compete independently. The Agencies also evaluate other market circumstances, e.g. entry, that may foster or prevent anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.

1.3 Competitor Collaborations Distinguished from Mergers

The competitive effects from competitor collaborations may differ from those of mergers due to a number of factors. Most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants. This remaining competition may reduce competitive concerns, but also may raise questions about whether participants have agreed to anticompetitive restraints on the remaining competition.

Mergers are designed to be permanent, while competitor collaborations are more typically of limited duration. Thus, participants in a collaboration typically remain potential competitors, even if they are not actual competitors for certain purposes (*e.g.*, R&D) during the collaboration. The potential for future competition between participants in a collaboration requires antitrust scrutiny different from that required for mergers.

Nonetheless, in some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if appropriate, which ordinarily is when: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period[10] by its own specific and express terms.[11] Effects of the collaboration on competition in other markets are analyzed as appropriate under these Guidelines or other applicable precedent. *See* Example 1.[12]

SECTION 2: GENERAL PRINCIPLES FOR EVALUATING AGREEMENTS AMONG COMPETITORS

2.1 Potential Procompetitive Benefits

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[10] In general, the Agencies use ten years as a term indicating sufficient permanence to justify treatment of a competitor collaboration as analogous to a merger. The length of this term may vary, however, depending on industry-specific circumstances, such as technology life cycles.

[11] This definition, however, does not determine obligations arising under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[12] Examples illustrating this and other points set forth in these Guidelines are included in the Appendix.

The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances.

Efficiency gains from competitor collaborations often stem from combinations of different capabilities or resources. For example, one participant may have special technical expertise that usefully complements another participant's manufacturing process, allowing the latter participant to lower its production cost or improve the quality of its product. In other instances, a collaboration may facilitate the attainment of scale or scope economies beyond the reach of any single participant. For example, two firms may be able to combine their research or marketing activities to lower their cost of bringing their products to market, or reduce the time needed to develop and begin commercial sales of new products. Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster.

2.2 Potential Anticompetitive Harms

Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants' ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.

2.3 Analysis of the Overall Collaboration and the Agreements of Which It Consists

A competitor collaboration comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom. In general, the Agencies assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration that may harm competition. For purposes of these Guidelines, the phrase "relevant agreement" refers to whichever of these three – the overall collaboration, an individual agreement, or a set of agreements – the evaluating Agency is assessing. Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement. *See* Example 2.

2.4 Competitive Effects Are Assessed as of the Time of Possible Harm to Competition

The competitive effects of a relevant agreement may change over time, depending on changes in circumstances such as internal reorganization, adoption of new agreements as part of the collaboration, addition or departure of participants, new market conditions, or changes in market share. The Agencies assess the competitive effects of a relevant agreement as of the time of possible harm to competition, whether at formation of the collaboration or at a later time, as appropriate. *See* Example 3. However, an assessment after a collaboration has been formed is sensitive to the reasonable expectations of participants whose significant sunk cost investments in reliance on the relevant agreement were made before it became anticompetitive.

SECTION 3: ANALYTICAL FRAMEWORK FOR EVALUATING AGREEMENTS AMONG COMPETITORS

3.1 Introduction

Section 3 sets forth the analytical framework that the Agencies use to evaluate the competitive effects of a competitor collaboration and the agreements of which it consists. Certain types of agreements are so likely to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for particularized inquiry into their effects.[13] Once identified, such agreements are challenged as per se illegal.[14]

Agreements not challenged as per se illegal are analyzed under the rule of reason. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. Under the rule of reason, the central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Given the great variety of competitor collaborations, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. Rule of reason analysis focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the

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[13] *See* Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

[14] *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 432-36.

relevant agreement.[15]

3.2 Agreements Challenged as Per Se Illegal

Agreements of a type that always or almost always tends to raise price or reduce output are per se illegal.[16] The Agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[17] The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects. The Department of Justice prosecutes participants in hard-core cartel agreements criminally.

If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal.[18] *See* Example 4. In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed (by a joint venture entity created by the collaboration or by one or more participants or by a third party acting on behalf of other participants) one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis set forth in Section 3.36 below. Such procompetitive benefits may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. *See* Examples 5 through 7.

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[15] *See California Dental Ass'n*, 119 S. Ct. at 1617-18; *Indiana Fed'n of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 104-13.

[16] *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-20 (1979).

[17] *See, e.g.*, Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (market allocation); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing).

[18] *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 339 n.7, 356-57 (1982) (finding no integration).

An agreement may be "reasonably necessary" without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary.[19] In making this assessment, except in unusual circumstances, the Agencies consider whether practical, significantly less restrictive means were reasonably available when the agreement was entered into, but do not search for a theoretically less restrictive alternative that was not practical given the business realities.

Before accepting a claim that an agreement is reasonably necessary to achieve procompetitive benefits from an integration of economic activity, the Agencies undertake a limited factual inquiry to evaluate the claim.[20] Such an inquiry may reveal that efficiencies from an agreement that are possible in theory are not plausible in the context of the particular collaboration. Some claims – such as those premised on the notion that competition itself is unreasonable – are insufficient as a matter of law,[21] and others may be implausible on their face. In any case, labeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output;[22] the nature of the conduct, not its designation, is determinative.

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[19] *See id.* at 352-53 (observing that even if a maximum fee schedule for physicians' services were desirable, it was not necessary that the schedule be established by physicians rather than by insurers); *Broadcast Music*, 441 U.S. at 20-21 (setting of price "necessary" for the blanket license).

[20] *See Maricopa*, 457 U.S. at 352-53, 356-57 (scrutinizing the defendant medical foundations for indicia of integration and evaluating the record evidence regarding less restrictive alternatives).

[21] *See Indiana Fed'n of Dentists*, 476 U.S. at 463-64; *NCAA*, 468 U.S. at 116-17; *Prof'l. Eng'rs*, 435 U.S. at 693-96. Other claims, such as an absence of market power, are no defense to per se illegality. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 434-36; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 & n.59 (1940).

[22] *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

3.3 Agreements Analyzed under the Rule of Reason

Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.[23]

Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.[24] The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement. Ordinarily, however, no one factor is dispositive in the analysis.

Under the rule of reason, the Agencies' analysis begins with an examination of the nature of the relevant agreement, since the nature of the agreement determines the types of anticompetitive harms that may be of concern. As part of this examination, the Agencies ask about the business purpose of the agreement and examine whether the agreement, if already in operation, has caused anticompetitive harm.[25] If the nature of the agreement and the absence of market power[26] together demonstrate the absence of anticompetitive harm, the Agencies do not challenge the agreement. *See* Example 8. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement,[27] or anticompetitive harm has resulted from an agreement

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[23] In addition, concerns may arise where an agreement increases the ability or incentive of buyers to exercise monopsony power. *See infra* Section 3.31(a).

[24] *See California Dental Ass'n* , 119 S. Ct. at 1612-13, 1617 ("What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."); *NCAA*, 468 U.S. 109 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye") (quoting Phillip E. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)).

[25] *See* Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

[26] That market power is absent may be determined without defining a relevant market. For example, if no market power is likely under any plausible market definition, it does not matter which one is correct. Alternatively, easy entry may indicate an absence of market power.

[27] *See California Dental Ass'n*, 119 S. Ct. at 1612-13, 1617 (an "obvious anticompetitive effect" would warrant quick condemnation); *Indiana Fed'n of Dentists*, 476 U.S. at 459; *NCAA*, 468 U.S. at 104, 106-10.

already in operation,[28] then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.[29]

If the initial examination of the nature of the agreement indicates possible competitive concerns, but the agreement is not one that would be challenged without a detailed market analysis, the Agencies analyze the agreement in greater depth. The Agencies typically define relevant markets and calculate market shares and concentration as an initial step in assessing whether the agreement may create or increase market power[30] or facilitate its exercise and thus poses risks to competition.[31] The Agencies examine factors relevant to the extent to which the participants and the collaboration have the ability and incentive to compete independently, such as whether an agreement is exclusive or non-exclusive and its duration.[32] The Agencies also evaluate whether entry would be timely, likely, and sufficient to deter or counteract any anticompetitive harms. In addition, the Agencies assess any other market circumstances that may foster or impede anticompetitive harms.

If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably

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[28] *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61 ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 424 (1986)); *NCAA*, 468 U.S. at 104-08, 110 n.42.

[29] *See Indiana Fed'n of Dentists*, 476 U.S. at 459-60 (condemning without "detailed market analysis" an agreement to limit competition by withholding x-rays from patients' insurers after finding no competitive justification).

[30] Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. Sellers also may exercise market power with respect to significant competitive dimensions other than price, such as quality, service, or innovation. Market power to a buyer is the ability profitably to depress the price paid for a product below the competitive level for a significant period of time and thereby depress output.

[31] *See* Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464 (1992).

[32] *Compare NCAA*, 468 U.S. at 113-15, 119-20 (noting that colleges were not permitted to televise their own games without restraint), *with Broadcast Music*, 441 U.S. at 23-24 (finding no legal or practical impediment to individual licenses).

necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.[33]

3.31 Nature of the Relevant Agreement: Business Purpose, Operation in the Marketplace and Possible Competitive Concerns

The nature of the agreement is relevant to whether it may cause anticompetitive harm. For example, by limiting independent decision making or combining control over or financial interests in production, key assets, or decisions on price, output, or other competitively sensitive variables, an agreement may create or increase market power or facilitate its exercise by the collaboration, its participants, or both. An agreement to limit independent decision making or to combine control or financial interests may reduce the ability or incentive to compete independently. An agreement also may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion,[34] either through facilitating practices such as an exchange of competitively sensitive information or through increased market concentration.

In examining the nature of the relevant agreement, the Agencies take into account inferences about business purposes for the agreement that can be drawn from objective facts. The Agencies also consider evidence of the subjective intent of the participants to the extent that it sheds light on competitive effects.[35] The Agencies do not undertake a full analysis of procompetitive benefits pursuant to Section 3.36 below, however, unless an anticompetitive harm appears likely.
The Agencies also examine whether an agreement already in operation has caused anticompetitive harm.[36] Anticompetitive harm may be observed, for example, if a competitor collaboration successfully mandates new, anticompetitive conduct or successfully eliminates procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market. If anticompetitive harm is found, examination of market power ordinarily is not required. In some cases, however, a determination of anticompetitive harm may be informed by consideration of market power.

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[33] *See NCAA*, 468 U.S. at 113-15 (rejecting efficiency claims when production was limited, not enhanced); *Prof'l. Eng'rs*, 435 U.S. at 696 (dictum) (distinguishing restraints that promote competition from those that eliminate competition); *Chicago Bd. of Trade*, 246 U.S. at 238 (same).

[34] As used in these Guidelines, "collusion" is not limited to conduct that involves an agreement under the antitrust laws.

[35] Anticompetitive intent alone does not establish an antitrust violation, and procompetitive intent does not preclude a violation. *See, e.g., Chicago Bd. of Trade*, 246 U.S. at 238. But extrinsic evidence of intent may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications where an agreement's effects are otherwise ambiguous.

[36] *See id.*

The following sections illustrate competitive concerns that may arise from the nature of particular types of competitor collaborations. This list is not exhaustive. In addition, where these sections address agreements of a type that otherwise might be considered per se illegal, such as agreements on price, the discussion assumes that the agreements already have been determined to be subject to rule of reason analysis because they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. *See supra* Section 3.2.

3.31(a) Relevant Agreements that Limit Independent Decision Making or Combine Control or Financial Interests

The following is intended to illustrate but not exhaust the types of agreements that might harm competition by eliminating independent decision making or combining control or financial interests.

Production Collaborations. Competitor collaborations may involve agreements jointly to produce a product sold to others or used by the participants as an input. Such agreements are often procompetitive.[37] Participants may combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce. However, production collaborations may involve agreements on the level of output or the use of key assets, or on the price at which the product will be marketed by the collaboration, or on other competitively significant variables, such as quality, service, or promotional strategies, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, the control over some or all production or key assets or decisions about key competitive variables that otherwise would be controlled independently.[38] Such agreements could reduce individual participants' control over assets necessary to compete and thereby reduce their ability to compete independently, combine financial interests in ways that undermine incentives to compete

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[37] The *NCRPA* accords rule of reason treatment to certain production collaborations. However, the statute permits per se challenges, in appropriate circumstances, to a variety of activities, including agreements to jointly market the goods or services produced or to limit the participants' independent sale of goods or services produced outside the collaboration. *NCRPA*, 15 U.S.C. §§ 4301-02.

[38] For example, where output resulting from a collaboration is transferred to participants for independent marketing, anticompetitive harm could result if that output is restricted or if the transfer takes place at a supracompetitive price. Such conduct could raise participants' marginal costs through inflated per-unit charges on the transfer of the collaboration's output. Anticompetitive harm could occur even if there is vigorous competition among collaboration participants in the output market, since all the participants would have paid the same inflated transfer price.

independently, or both.

Marketing Collaborations. Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables.

Buying Collaborations. Competitor collaborations may involve agreements jointly to purchase necessary inputs. Many such agreements do not raise antitrust concerns and indeed may be procompetitive. Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies. However, such agreements can create or increase market power (which, in the case of buyers, is called "monopsony power") or facilitate its exercise by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement. Buying collaborations also may facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases.

Research & Development Collaborations. Competitor collaborations may involve agreements to engage in joint research and development ("R&D"). Most such agreements are procompetitive, and they typically are analyzed under the rule of reason.[39] Through the combination of complementary assets, technology, or know-how, an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes. Joint R&D agreements, however, can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts. Although R&D collaborations also may facilitate tacit collusion on R&D efforts, achieving, monitoring, and punishing departures from collusion is sometimes difficult in the R&D context.

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[39] Aspects of the antitrust analysis of competitor collaborations involving R&D are governed by provisions of the *NCRPA*, 15 U.S.C. §§ 4301-02.

An exercise of market power may injure consumers by reducing innovation below the level that otherwise would prevail, leading to fewer or no products for consumers to choose from, lower quality products, or products that reach consumers more slowly than they otherwise would. An exercise of market power also may injure consumers by reducing the number of independent competitors in the market for the goods, services, or production processes derived from the R&D collaboration, leading to higher prices or reduced output, quality, or service. A central question is whether the agreement increases the ability or incentive anticompetitively to reduce R&D efforts pursued independently or through the collaboration, for example, by slowing the pace at which R&D efforts are pursued. Other considerations being equal, R&D agreements are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their supracompetitive earnings. In addition, anticompetitive harm generally is more likely when R&D competition is confined to firms with specialized characteristics or assets, such as intellectual property, or when a regulatory approval process limits the ability of late-comers to catch up with competitors already engaged in the R&D.

3.31(b) Relevant Agreements that May Facilitate Collusion

Each of the types of competitor collaborations outlined above can facilitate collusion. Competitor collaborations may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anticompetitively, as well as a greater ability to detect and punish deviations that would undermine the collusion. Certain marketing, production, and buying collaborations, for example, may provide opportunities for their participants to collude on price, output, customers, territories, or other competitively sensitive variables. R&D collaborations, however, may be less likely to facilitate collusion regarding R&D activities since R&D often is conducted in secret, and it thus may be difficult to monitor an agreement to coordinate R&D. In addition, collaborations can increase concentration in a relevant market and thus increase the likelihood of collusion among all firms, including the collaboration and its participants.

Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration. Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information.

Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

3.32 Relevant Markets Affected by the Collaboration

The Agencies typically identify and assess competitive effects in all of the relevant product and geographic markets in which competition may be affected by a competitor collaboration, although in some cases it may be possible to assess competitive effects directly without defining a particular relevant market(s). Markets affected by a competitor collaboration include all markets in which the economic integration of the participants' operations occurs or in which the collaboration operates or will operate,[40] and may also include additional markets in which any participant is an actual or potential competitor.[41]

3.32(a) Goods Markets

In general, for goods[42] markets affected by a competitor collaboration, the Agencies approach relevant market definition as described in Section 1 of the *Horizontal Merger Guidelines*. To determine the relevant market, the Agencies generally consider the likely reaction of buyers to a price increase and typically ask, among other things, how buyers would respond to increases over prevailing price levels. However, when circumstances strongly suggest that the prevailing price exceeds what likely would have prevailed absent the relevant agreement, the Agencies use a price more reflective of the price that likely would have prevailed. Once a market has been defined, market shares are assigned both to firms currently in the relevant market and to firms that are able to make "uncommitted" supply responses. *See* Sections 1.31 and 1.32 of the *Horizontal Merger Guidelines*.

3.32(b) Technology Markets

When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may define technology markets in assessing the competitive effects of a competitor collaboration that includes an agreement to license intellectual property. Technology markets consist of the intellectual property that is licensed and its close substitutes;

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[40] For example, where a production joint venture buys inputs from an upstream market to incorporate in products to be sold in a downstream market, both upstream and downstream markets may be "markets affected by a competitor collaboration."

[41] Participation in the collaboration may change the participants' behavior in this third category of markets, for example, by altering incentives and available information, or by providing an opportunity to form additional agreements among participants.

[42] The term "goods" also includes services.

that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed. The Agencies approach the definition of a relevant technology market and the measurement of market share as described in Section 3.2.2 of the *Intellectual Property Guidelines.*

3.32(c) Research and Development: Innovation Markets

In many cases, an agreement's competitive effects on innovation are analyzed as a separate competitive effect in a relevant goods market. However, if a competitor collaboration may have competitive effects on innovation that cannot be adequately addressed through the analysis of goods or technology markets, the Agencies may define and analyze an innovation market as described in Section 3.2.3 of the *Intellectual Property Guidelines*. An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

3.33 Market Shares and Market Concentration

Market share and market concentration affect the likelihood that the relevant agreement will create or increase market power or facilitate its exercise. The creation, increase, or facilitation of market power will likely increase the ability and incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Other things being equal, market share affects the extent to which participants or the collaboration must restrict their own output in order to achieve anticompetitive effects in a relevant market. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. In assessing whether an agreement may cause anticompetitive harm, the Agencies typically calculate the market shares of the participants and of the collaboration.[43] The Agencies assign a range of market shares to the collaboration. The high end of that range is the sum of the market shares of the collaboration and its participants. The low end is the share of the collaboration in isolation. In general, the Agencies approach the calculation of market share as set forth in Section 1.4 of the *Horizontal Merger Guidelines*.

Other things being equal, market concentration affects the difficulties and costs of achieving and

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[43] When the competitive concern is that a limitation on independent decision making or a combination of control or financial interests may yield an anticompetitive reduction of research and development, the Agencies typically frame their inquiries more generally, looking to the strength, scope, and number of competing R&D efforts and their close substitutes. *See supra* Sections 3.31(a) and 3.32(c).

enforcing collusion in a relevant market. Accordingly, in assessing whether an agreement may increase the likelihood of collusion, the Agencies calculate market concentration. In general, the Agencies approach the calculation of market concentration as set forth in Section 1.5 of the *Horizontal Merger Guidelines*, ascribing to the competitor collaboration the same range of market shares described above.

Market share and market concentration provide only a starting point for evaluating the competitive effect of the relevant agreement. The Agencies also examine other factors outlined in the *Horizontal Merger Guidelines* as set forth below:

The Agencies consider whether factors such as those discussed in Section 1.52 of the *Horizontal Merger Guidelines* indicate that market share and concentration data overstate or understate the likely competitive significance of participants and their collaboration.

In assessing whether anticompetitive harm may arise from an agreement that combines control over or financial interests in assets or otherwise limits independent decision making, the Agencies consider whether factors such as those discussed in Section 2.2 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In assessing whether anticompetitive harms may arise from an agreement that may increase the likelihood of collusion, the Agencies consider whether factors such as those discussed in Section 2.1 of the *Horizontal Merger Guidelines* suggest that anticompetitive harm is more or less likely.

In evaluating the significance of market share and market concentration data and interpreting the range of market shares ascribed to the collaboration, the Agencies also examine factors beyond those set forth in the *Horizontal Merger Guidelines*. The following section describes which factors are relevant and the issues that the Agencies examine in evaluating those factors.

3.34 Factors Relevant to the Ability and Incentive of the Participants and the Collaboration to Compete

Competitor collaborations sometimes do not end competition among the participants and the collaboration. Participants may continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. Collaborations may be managed by decision makers independent of the individual participants. Control over key competitive variables may remain outside the collaboration, such as where participants independently market and set prices for the collaboration's output.

Sometimes, however, competition among the participants and the collaboration may be restrained through explicit contractual terms or through financial or other provisions that reduce or eliminate the incentive to compete. The Agencies look to the competitive benefits and harms of the relevant agreement, not merely the formal terms of agreements among the participants.

Where the nature of the agreement and market share and market concentration data reveal a likelihood of anticompetitive harm, the Agencies more closely examine the extent to which the participants and the collaboration have the ability and incentive to compete independent of each other. The Agencies are likely to focus on six factors: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants' financial interests in the collaboration or in each other; (d) the control of the collaboration's competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration.

Each of these factors is discussed in further detail below. Consideration of these factors may reduce or increase competitive concern. The analysis necessarily is flexible: the relevance and significance of each factor depends upon the facts and circumstances of each case, and any additional factors pertinent under the circumstances are considered. For example, when an agreement is examined subsequent to formation of the collaboration, the Agencies also examine factual evidence concerning participants' actual conduct.

3.34(a) Exclusivity

The Agencies consider whether, to what extent, and in what manner the relevant agreement permits participants to continue to compete against each other and their collaboration, either through separate, independent business operations or through membership in other collaborations. The Agencies inquire whether a collaboration is non-exclusive in fact as well as in name and consider any costs or other impediments to competing with the collaboration. In assessing exclusivity when an agreement already is in operation, the Agencies examine whether, to what extent, and in what manner participants actually have continued to compete against each other and the collaboration. In general, competitive concern likely is reduced to the extent that participants actually have continued to compete, either through separate, independent business operations or through membership in other collaborations, or are permitted to do so.

3.34(b) Control over Assets

The Agencies ask whether the relevant agreement requires participants to contribute to the collaboration significant assets that previously have enabled or likely would enable participants to be effective independent competitors in markets affected by the collaboration. If such resources must be contributed to the collaboration and are specialized in that they cannot readily be replaced, the participants may have lost all or some of their ability to compete against each other and their collaboration, even if they retain the contractual right to do so.[44] In general, the greater

[44] For example, if participants in a production collaboration must contribute most of their productive capacity to the collaboration, the collaboration may impair the ability of its participants to remain effective independent competitors regardless of the terms of the agreement.

the contribution of specialized assets to the collaboration that is required, the less the participants may be relied upon to provide independent competition.

3.34(c) Financial Interests in the Collaboration or in Other Participants

The Agencies assess each participant's financial interest in the collaboration and its potential impact on the participant's incentive to compete independently with the collaboration. The potential impact may vary depending on the size and nature of the financial interest (e.g., whether the financial interest is debt or equity). In general, the greater the financial interest in the collaboration, the less likely is the participant to compete with the collaboration.[45] The Agencies also assess direct equity investments between or among the participants. Such investments may reduce the incentives of the participants to compete with each other. In either case, the analysis is sensitive to the level of financial interest in the collaboration or in another participant relative to the level of the participant's investment in its independent business operations in the markets affected by the collaboration.

3.34(d) Control of the Collaboration's Competitively Significant Decision Making

The Agencies consider the manner in which a collaboration is organized and governed in assessing the extent to which participants and their collaboration have the ability and incentive to compete independently. Thus, the Agencies consider the extent to which the collaboration's governance structure enables the collaboration to act as an independent decision maker. For example, the Agencies ask whether participants are allowed to appoint members of a board of directors for the collaboration, if incorporated, or otherwise to exercise significant control over the operations of the collaboration. In general, the collaboration is less likely to compete independently as participants gain greater control over the collaboration's price, output, and other competitively significant decisions.[46]

To the extent that the collaboration's decision making is subject to the participants' control, the Agencies consider whether that control could be exercised jointly. Joint control over the collaboration's price and output levels could create or increase market power and raise competitive concerns. Depending on the nature of the collaboration, competitive concern also may arise due to joint control over other competitively significant decisions, such as the level and

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[45] Similarly, a collaboration's financial interest in a participant may diminish the collaboration's incentive to compete with that participant.

[46] Control may diverge from financial interests. For example, a small equity investment may be coupled with a right to veto large capital expenditures and, thereby, to effectively limit output. The Agencies examine a collaboration's actual governance structure in assessing issues of control.